Nos. 96-7151 and 96-7726

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DEBRA FAYE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES M. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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23 pp

QUESTION PRESENTED

Whether petitioners were properly charged, convicted, and sentenced for the murder of their four-year old daughter under the Assimilative Crimes Act, 18 U.S.C. 13, and the Louisiana child murder statute, 14 La. Rev. Stat. Ann. § 30A(5).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28)[1] is reported at 92 F.3d 1371. The opinion of the district court denying petitioners' pretrial motions to dismiss the indictment is reported at 848 F. Supp. 692.

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[1] "Pet. App." refers to the appendix to the petition in No. 96-7151.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1996. Petitions for rehearing were denied on September 16, 1996 (Pet. App. B) and October 30, 1996 (96-7726 Pet. App. B). The petition for a writ of certiorari in No. 96-7151 was filed on December 16, 1996. The petition for a writ of certiorari in No. 96-7726 was filed on January 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioners James M. Lewis and Debra Faye Lewis were convicted of first degree murder of Jadasha D. Lowery, in violation of 14 La. Rev. Stat. Ann. § 30A(5), and pursuant to the Assimilative Crimes Act, 18 U.S.C. 13, 7, and 2. Petitioners were sentenced to life imprisonment. The court of appeals affirmed the convictions and sentences. Pet. App. 1-28.

1. Jadasha Lowery was the four-year-old daughter of petitioner James Lewis. Petitioner Debra Lewis was her stepmother. Her death occurred in the family's home at Fort Polk, a United States military reservation, where petitioner James Lewis was stationed with the U.S. Army. Pet. App. 2.

Jadasha was killed at the hands of petitioners on December 20, 1993, as the result of repeated and severe beatings. The forensic pathologist who examined Jadasha counted over two hundred injuries on her body. Jadasha received most of those injuries within 24 hours of her death, although raw sores, lacerations and callouses

on her body evidenced chronic and repetitive injuries. Pet. App. 2, 21.

Petitioners admitted that they had beaten Jadasha numerous times within the 24-hour period before her death. Petitioner James Lewis shook the little girl and beat her with his hand or a fly swatter. Petitioner Debra Lewis beat Jadasha with a fly swatter, hit her across the face with a coat hanger, and also used switches to whip the child. Because the three spent the day of Jadasha's death together, each petitioner was aware of the beatings administered by the other. Indeed, once during the day, the little girl ran into her room following a beating by James Lewis -- only to have Debra Lewis summon her again for another round of beatings by her father. Pet. App. 19.

Investigators at the crime scene found blood throughout the house: on the floor of the living room, on the floor in Jadasha's room, on the sofa, window curtain, closet doors in the hallway, master bedroom closet, on the walls, on clothing, on blankets. Blood was found on pieces of a curtain rod found crumpled in the Lewises' garbage can. One blood spot on the wall looked like a child's smeared hand print. Pet. App. 20.

The pathologist testified that Jadasha had died of a cerebral edema -- a swelling of the brain that ultimately causes respiratory functions to cease -- caused by a blow to the head. He conservatively counted nine head injuries, any one of which was sufficient to cause death. He testified that such a blow was the equivalent of dropping a child on her head from more than three

feet onto an uncarpeted floor. Pet. App. 2, 21. Jadasha also suffered massive hemorrhaging, losing one- to two-thirds of her entire blood volume from her circulatory system, which was redirected into the tissues underlying her injuries. The pathologist testified that the hemorrhaging could have eventually caused the girl's death if the head injuries had not killed her first. Id. at 21.

Neighbors and friends attested to a history of child abuse by petitioners. One had observed injuries on Jadasha on several occasions, including a large black eye and burst lip. Another told of how petitioner Debra Lewis withheld food from Jadasha for three days, and how she bathed the little girl in bleach. Others corroborated signs of injury and abuse, including a burn on Jadasha's ear caused by hot liquid. A few remembered hearing petitioner Debra Lewis state that "if she didn't stop whipping Jadasha she would hurt her or kill her," and that "she was going to let James whip [Jadasha because] [s]he wasn't going to go to jail for killing that child." Pet. App. 21-22.

2. The indictment charged petitioners with first degree murder under Louisiana law[2] pursuant to the Assimilative Crimes Act

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[2] The Louisiana first degree murder statute provides, in pertinent part:

> A. First Degree Murder is the killing of a human being:
> * * * * *
> (5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve.

14 La. Rev. Stat. Ann. § 30A(5). The Louisiana statute provides for a mandatory sentence of life imprisonment if the government does not seek the death penalty. 14 La. Rev. Stat. Ann. § 30C.

(ACA or Act).[3] Before trial, petitioners filed motions to dismiss the indictment. They argued that the federal murder statute, 18 U.S.C. 1111, provides for the specific crime of first degree murder, and that the assimilation of the Louisiana murder statute under the Assimilative Crimes Act was therefore improper.[4] 96-7726 Pet. 3-4; Debra Lewis C.A. Record Excerpts ¶ 5.

The district court denied the motions, holding that petitioners were properly charged under the Louisiana statute, which classifies as first degree murder the killing of a victim

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[3] The Assimilative Crimes Act provides in pertinent part:

> (a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. 13. The Act applies within the "special maritime and territorial jurisdiction of the United States," as defined by 18 U.S.C. 7. That area includes, inter alia, "[a]ny lands reserved or acquired for the use of the United States * * * for the erection of a fort, magazine, arsenal, dockyard, or other needful building." 18 U.S.C. 7(4).

[4] The federal murder statute provides, in pertinent part:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing * * * is murder in the first degree.
> Any other murder is murder in the second degree.

18 U.S.C. 1111(a). Like the Assimilative Crimes Act, the federal murder statute applies "[w]ithin the special maritime and territorial jurisdiction of the United States." 18 U.S.C. 1111(b).

under the age of 12 when committed with specific intent to kill or to inflict great bodily harm. United States v. Lewis, 848 F. Supp. 692, 695 (W.D. La. 1994); see note 2, supra. The court concluded that although the federal murder statute encompasses all murders, the "precise act" prohibited under Louisiana law -- the murder of a child under 12 -- is not murder in the first degree under federal law. Ibid. The Louisiana statute, the court explained, aims specifically to deter child abuse, a purpose not addressed by its federal counterpart. Ibid.

3. Following their convictions, petitioners were sentenced to life imprisonment under the federal Sentencing Guidelines. Pet. App. C. They were each assigned a base offense level of 43, pursuant to the Guideline for first degree murder, § 2A1.1. Both were given two additional points under Guidelines § 3A1.1 (vulnerable victim), for a final offense level of 45. Both were placed in Criminal History Category I. The resulting Guidelines sentence for each petitioner was life imprisonment. Debra Lewis Presentence Report (PSR) at 14-15; James Lewis PSR at 14-15. The district court sentenced each petitioner to life imprisonment. Pet. App. 3.

4. The court of appeals affirmed petitioners' convictions and sentences. Pet. App. 1-28.

The court of appeals first held that petitioners should have been charged under the federal murder statute rather than the Louisiana murder statute and the Assimilative Crimes Act. The court asserted that the Assimilative Crimes Act "fills in gaps

existing in federal statutes regarding criminal law," but that "where Congress has enacted legislation criminalizing conduct on the enclaves, the federal statutes preempt the state laws regarding those crimes." Pet. App. 4. In the view of the court of appeals, no "gap" in federal law existed because the conduct at issue was proscribed by 18 U.S.C. 1111. Pet. App. 9. The court concluded that "the federal murder statute preempts the Louisiana first degree murder statute because the killing of a human being is punishable under the federal statute and because the nature of the crime 'murder of a child' does not differ substantially from the nature and theory of murder in general." Id. at 12.

The court held, however, that the government's reliance on the Assimilative Crimes Act did not require reversal of petitioners' convictions. The court explained that

> [t]he basic elements are the same for second degree murder under 18 U.S.C. § 1111(a) and first degree murder under La. Rev. Stat. § 14:30A(5). Both statutes require proof of specific intent and the killing of a human being. Regarding intent, 18 U.S.C. § 1111 requires proof of "specific intent to inflict serious bodily injury," and La. Rev. Stat. § 14:30A(5) requires proof of "specific intent to inflict great bodily harm." * * * Though labeled somewhat differently, "intent to inflict serious bodily injury" and "intent to inflict great bodily harm" represent parallel intents for purposes of evaluating these murder statutes.

Pet. App. 14-15 (footnote omitted). Based on the statutory elements of the state and federal crimes, and the instructions given to the jury at petitioners' trial, the court of appeals concluded that the elements of second degree murder under federal law had been proved by the government and found by the jury. Id. at 15-16.

The court of appeals also concluded that a remand for resentencing was not required. The court stated that "[r]esentencing is only required where the district court has imposed a sentence that exceeded the maximum sentence that the defendant would have received if sentenced under the applicable federal statute." Pet. App. 16. The court observed that petitioners "did not receive a sentence exceeding the maximum sentence allowed under the federal murder statute," because federal law provides that persons convicted of second degree murder may be imprisoned "for any term of years or for life." Id. at 17 (quoting 18 U.S.C. 1111(b)). The court concluded on that basis that it "need not remand for resentencing." Pet. App. 17.[5]

ARGUMENT

Petitioner Debra Lewis contends (96-7151 Pet. 9-14) that her conviction should be reversed and the case remanded for a new trial. Both petitioners argue that the court of appeals erred in affirming their sentences. 96-7151 Pet. 9, 14-18; 96-7726 Pet. 6-11. Those arguments are premised on the court of appeals' determination that petitioners should have been tried under the federal murder statute rather than the Assimilative Crimes Act and the Louisiana child murder statute. As we explain below, however, petitioners were properly charged, convicted, and sentenced under the Assimilative Crimes Act and the Louisiana child murder statute.

[5] The court of appeals also rejected petitioners' challenges to the sufficiency of the evidence and to the admission into evidence of certain photographs and of petitioners' own statements to investigators. Pet. App. 17-28. Petitioners do not press those challenges in this Court.

Thus, although we disagree with the court of appeals' reasoning on that point, the court's judgment affirming petitioners' convictions and sentences is correct. Further review is not warranted.[6]

1. The Assimilative Crimes Act "use[s] local statutes to fill in gaps in the Federal Criminal Code where no action of Congress has been taken to define the missing offenses," Williams v. United States, 327 U.S. 711, 719 (1946), by making the penal laws of a State applicable to crimes committed in federal enclaves. See United States v. Hall, 979 F.2d 320, 322 (3d Cir. 1992); United States v. Brown, 608 F.2d 551, 553 (5th Cir. 1979); see also United States v. Sharpnack, 355 U.S. 286, 293 (1958) ("within each federal enclave, to the extent that offenses are not pre-empted by congressional enactments, there shall be complete current conformity with the criminal laws of the respective States in which the enclaves are situated"). The Act applies to any "act or omission" occurring within a federal enclave "which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State * * * in which such place is situated." 18 U.S.C. 13(a).

This Court's most thorough discussion of the ACA was set forth in its decision in Williams. The defendant in that case was charged with having intercourse with a female between the ages of 16 and 18 in Indian country. He was convicted of statutory rape

[6] The prevailing party may defend a judgment before this Court on any ground properly raised below, whether relied upon, rejected, or even considered by the district court or court of appeals. See, e.g., Bennett v. Spear, No. 95-813 (March 19, 1997), slip op. 11.

under an Arizona statute that set the age of consent at 18. At the time of the prosecution and conviction, federal law defined the separate crimes of rape, assault with intent to commit rape, carnal knowledge of a girl less than 16 years old, adultery, and fornication. 327 U.S. at 713-714 & nn. 4-8. This Court agreed that the ACA applies to crimes committed in Indian country, id. at 713, but concluded that the state law setting the age of consent at 18 could not be assimilated under the ACA in light of Congress's decision to set the age of consent at 16. Id. at 717-718. As the Court explained, where "(1) the precise acts upon which the conviction depends have been made penal by the laws of Congress" and "(2) the offense known to [state law] has been defined and prohibited by the Federal Criminal Code," the federal offense cannot "be redefined and enlarged by application to it of the Assimilative Crimes Act." Id. at 717. "Because Congress intended to "cover rape and all related offenses fully" and "gave special attention to the age of consent," id. at 724, the Court held, the Arizona statutory rape law could not be applied to the federal enclave under the ACA.

The ACA is not rendered inapplicable simply because the primary conduct that is the subject of the prosecution might also violate some federal criminal law.[7] Rather, the ACA applies unless

[7] The courts of appeals have frequently sustained convictions for assimilated state crimes under the ACA, even where the defendant's conduct would also have been subject to prosecution under a federal criminal statute. See, e.g., United States v. Sasnett, 925 F.2d 392, 396 (11th Cir. 1991) ("precise act" of causing death while driving under the influence of alcohol was properly prosecuted under state law even though defendant's conduct

Congress has addressed the specific problem that is the subject of the state law sought to be assimilated, in a manner that conflicts with the policies reflected in the state enactment. Thus, in Williams, assimilation of the Arizona statutory rape offense would have frustrated Congress's decision to set the age of consent at 16. See 327 U.S. at 718 ("a conflicting State definition does not enlarge the scope of the offense defined by Congress").

No such conflict exists in this case. Louisiana has made the murder of a child -- either with specific intent to kill or to cause serious bodily injury -- a separate and distinct crime, punishable as first degree murder. 14 La. Rev. Stat. Ann. § 30A(5). The State has evidently determined that killing a child, whether deliberately or through intentional abuse, is a distinct offense warranting a distinct penalty. See Louisiana v. Weiland, 505 So.2d 702, 709 & n.31 (La. 1987) (passage of child murder statute reflects the view that "[c]hildren * * * are in the category of persons needing special protection"). The State's

was also covered by federal involuntary manslaughter statute; state law was "designed to punish specific conduct which is not specifically addressed by federal law"); United States v. Griffith, 864 F.2d 421, 423-424 (6th Cir. 1988) (ACA prosecutions may appropriately be brought for various forms of aggravated assault, even where conduct in question also violates federal assault statute), cert. denied, 490 U.S. 1111 (1989); United States v. Kaufman, 862 F.2d 236, 237-238 (9th Cir. 1988) (per curiam) (ACA prosecution was brought under an assimilated Oregon law that prohibited pointing a loaded or unloaded firearm at another; court held that the ACA charge was proper even though defendant might have been prosecuted under federal assault statute); Fields v. United States, 438 F.2d 205, 207 (2d Cir.), cert. denied, 403 U.S. 907 (1971) (assimilation of state malicious shooting statute was proper even though acts committed were criminal under federal assault statute; state statute "provides a theory essentially different from that provided in the federal statute").

decision is not in conflict with any federal enactment: Congress has not addressed the subject of child murder in a direct or specific manner.

The court of appeals decisions most closely on point have recognized that state laws prohibiting the abuse of children may properly be applied in federal enclaves under the Assimilative Crimes Act, even where the conduct at issue is also violative of a more general federal law. In United States v. Brown, the defendant was convicted under a Texas child abuse statute, pursuant to the ACA, for beatings inflicted upon her two-year-old stepson. She argued that the ACA was inapplicable because her alleged conduct was covered by the federal assault statute. 608 F.2d at 553. The court rejected that contention. It recognized that the defendant could have been charged under the federal statute -- which criminalized, inter alia, "assault by striking, beating, or wounding." Id. at 554 (quoting 18 U.S.C. 113(d)). It held, however, that assimilation of the state statute was proper because the "precise act" of injury to a child was not proscribed by federal law. Ibid. Child abuse, the court explained, is "specific conduct of a different character" than that criminalized by the federal assault statute. Ibid.

Similarly, in United States v. Fesler, 781 F.2d 384 (5th Cir.), cert. denied, 476 U.S. 1118 (1986), two parents convicted of federal involuntary manslaughter and state child abuse challenged their state law convictions under the Assimilative Crimes Act. They argued that their alleged conduct -- the fatal scalding of

their infant daughter -- could not be prosecuted under the Assimilative Crimes Act because it was also violative of the federal manslaughter statute. Id. at 390. The court rejected that claim, explaining that "the criminal acts charged are distinct" because, inter alia, "[t]he Texas penal code states that the victim must be under 14 years old or under before all the elements of child abuse are satisfied." Id. at 391. The court deemed it "important that the state statute seeks to punish a particular offense at which the federal [involuntary manslaughter] statute is not aimed, child abuse." Ibid. Similarly here, the relevant Louisiana Code provision is directed to an evil -- the murder of children -- that is not the subject of any distinct federal prohibition.

In explaining its contrary conclusion in this case, the court of appeals stated that the "different nature of the 'act' regarding child abuse does not eliminate the need for seeking punishment for murder under the federal statute when the abuse results in death." Pet. App. 7. In support of that proposition, the court cited United States v. Webb, 796 F.2d 60, 62 (5th Cir. 1986), cert. denied, 479 U.S. 1038 (1987), in which the defendant was charged both with federal murder and child abuse under Texas law; United States v. Phillip, 948 F.2d 241, 245 (6th Cir. 1991), cert. denied, 504 U.S. 930 (1992), in which defendants were charged under the federal murder statute as well as the Kentucky criminal abuse statute; and United States v. Harris, 661 F.2d 138, 139 (10th Cir. 1981), where the Wyoming child abuse statute was assimilated under

the ACA and charged in addition to federal murder. Pet. App. 7. The court's reliance on those decisions was misplaced. The question in this case is not whether petitioners' conduct could have been prosecuted under the federal murder statute. Such a prosecution would assuredly have been proper. As we explain above, however, the potential applicability of a general federal criminal statute does not foreclose assimilation of a state law that is more precisely directed at a particular evil.[8] Indeed, the courts in Webb, Phillip, and Harris affirmed the defendants' convictions on the assimilated state charges notwithstanding the fact that in each case the conduct at issue was also violative of the federal murder statute. Similarly in the instant case, the fact that petitioners' conduct was subject to prosecution under the federal murder statute did not preclude assimilation, under the ACA, of a state law specifically directed to the murder of children.

Because petitioners were properly tried and convicted pursuant to the Louisiana child murder statute and the ACA, their sentences of life imprisonment were consistent with -- indeed, dictated by -- applicable law. The Assimilative Crimes Act provides that a person who commits a state crime on a federal enclave "shall be guilty of a like offense and subject to a like punishment." 18 U.S.C. 13(a). In sentencing a defendant convicted of an assimilated state crime,

[8] At the time of the prosecutions and convictions in Webb, Phillip, and Harris, Texas, Kentucky, and Wyoming had not criminalized child murder. See Tex. Penal Code Ann. § 1902; Ky. Rev. Stat. Ann. § 507.020. The Wyoming murder statute currently classifies as first degree murder the killing of a child in the course of child abuse. Wyo. Stat. § 6-2-101. That provision was added to the code in 1994, well after the 1981 decision in Harris.

a court generally applies the Sentencing Guidelines provisions applicable to the most closely analogous federal crime. State law, however, establishes both the minimum and maximum penalties to which the defendant may be exposed. See United States v. Pierce, 75 F.3d 173, 176 (4th Cir. 1996); United States v. Garcia, 893 F.2d 250, 254 (10th Cir. 1989), cert. denied, 494 U.S. 1070 (1990); United States v. Leake, 908 F.2d 550, 553 (9th Cir. 1990); United States v. Marmolejo, 915 F.2d 981, 984 (5th Cir. 1990).

The Louisiana first degree murder statute provides for a mandatory life sentence if the government does not seek the death penalty. 14 La. Rev. Stat. Ann. § 30C. The United States did not seek the death penalty in this case. The district court was therefore required to sentence petitioners to life imprisonment. The court's consideration of the Sentencing Guidelines (see page 6, supra) was thus superfluous; but the sentence imposed by the court was mandated by Louisiana law and was therefore correct under the ACA.

2. Petitioner Debra Lewis contends (96-7151 Pet. 9-11) that the court of appeals erred in affirming her conviction. The premise of petitioner's argument is that the court of appeals correctly concluded that assimilation of the Louisiana child murder statute was improper. As explained above, that premise is mistaken. Even if that premise were correct, however, it would not support reversal of petitioner's conviction.[9] The courts of

[9] Petitioner James Lewis concedes that the "appropriate remedy is not reversal of the conviction." 96-7726 Pet. 9.

appeals agree that a conviction pursuant to an improperly assimilated state statute may be affirmed where the essential elements of the preemptive federal crime have been proved at trial and found by the jury. See United States v. Hall, 979 F.2d 320, 323 (3d Cir. 1992); United States v. Lavender, 602 F.2d 639, 641 (4th Cir. 1979); United States v. Walker, 557 F.2d 741, 746 (10th Cir. 1977); United States v. Chaussee, 536 F.2d 637, 644-645 (7th Cir. 1976); United States v. Word, 519 F.2d 612, 618 (8th Cir.), cert. denied, 423 U.S. 934 (1975); United States v. Olvera, 488 F.2d 607, 608 (5th Cir. 1973), cert. denied, 416 U.S. 917 (1974); Hockenberry v. United States, 422 F.2d 171, 174 (9th Cir. 1970). Petitioner Debra Lewis cites no contrary authority.

In this case, the court of appeals correctly held that the government had proved, and the jury had found in returning its verdict on the assimilated state charge, all of the elements of federal second degree murder. Pet. App. 12-16. The court focused in particular on the federal statute's requirement that the defendant act with "malice aforethought." 18 U.S.C. 1111(a). In Lara v. Parole Comm'n, 990 F.2d 839, 841 (5th Cir. 1993), the court outlined the three distinct mental states encompassed by malice aforethought: 1) intent to kill; 2) intent to do serious bodily injury; and 3) extreme recklessness and wanton disregard for human life. See also United States v. Shaw, 701 F.2d 367, 392 n.20 (5th Cir. 1983) (malice does not require subjective intent to kill, but may be established by evidence of conduct which is "reckless and wanton and a gross deviation from the reasonable standard of care"

such that a jury can infer that defendant was aware of serious risk of death or bodily harm), cert. denied, 465 U.S. 1067 (1984); accord United States v. Sheffey, 57 F.3d 1419, 1430 (6th Cir. 1995), cert. denied, 116 S. Ct. 749 (1996); United States v. Ryan, 9 F.3d 660, 671 n.11 (8th Cir. 1994), on rehearing en banc, 41 F.3d 361 (8th Cir. 1994), cert. denied, 115 S. Ct. 1793 (1995); United States v. Sides, 944 F.2d 1554, 1558 (10th Cir.), cert. denied, 502 U.S. 989 (1991); United States v. Fleming 739 F.2d 945, 947-948 (4th Cir. 1984), cert. denied, 469 U.S. 1193 (1985); United States v. Cox, 509 F.2d 390, 392 (D.C. Cir. 1974).

In accordance with the language of the Louisiana child murder statute, the district court instructed the jury that it could convict petitioners only if it found that they had "acted with specific intent to kill or inflict great bodily harm." Pet. App. 16. In light of the comparable intent standards embodied in the state and federal laws, petitioner Debra Lewis's claim of prejudice, because of a purportedly "easier burden of proof" required of the government under the Louisiana law, 96-7151 Pet. 12, is without merit. There would consequently be no basis for reversal of petitioner's conviction even if the assimilation of the Louisiana child murder statute were improper.[10]

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[10] If the application of the ACA to petitioners had been improper, the appropriate remedy would be to remand for resentencing, pursuant to the Sentencing Guidelines, on the federal offense of second degree murder. See 96-7726 Pet. 9-10; United States v. Lavender, 602 F.2d at 641; United States v. Walker, 557 F.2d at 746; United States v. Chaussee, 536 F.2d at 644-45; United States v. Word, 519 F.2d at 618; Hockenberry v. United States, 422 F.2d at 174. We do not agree with the court of appeals' conclusion (see Pet. App. 16-17) that resentencing would be unnecessary simply

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1997

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because the terms of imprisonment imposed by the district court fell within the statutory maximum sentence for second degree murder under federal law.

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 28th day of March, 1997.

See Attached Service Lists

Walter Dellinger/cs

WALTER DELLINGER
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March 28, 1997

96-7151
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